

*inventarii*, and to come in with the other legacies *pro rata*. *Vide supra*, No. 7, [*Mosman* against *Bells*, February 1670,] and No. 160, [March 1671.]

Sir George Lockhart was of opinion that a man's own private deed was not enough to warrant such dispositions on deathbed. Yet thought if a man had his lands given him by his Majesty's charter, or if he caused insert in his charter any such power, that the same would sustain *quoad* the lands contained in that charter; (which power the Earl of Teviot had.) *De quo multus dubito*. The tutors offered her assignations to bonds for her liferent use; see this repelled 13th February, 1629, *Cochrane and Dauling*.

*Advocates' MS. No. 227, folio 105.*

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1671. July.

*Vide infra*, No. 307, some actions and decisions that were in this month of July.

*Advocates' MS. folio 105.*

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1671. July.

#### ANENT FIDEJUSSION.

ABOUT this time a bond granted by a principal and his cautioner was quarrelled as null *quoad* the cautioner, because he had signed it six days before the principal; and it was alleged that fidejussion being an accession and sequel of the principal obligation, (without which it cannot subsist,) it must follow the same and not precede it.

The Lords found whatever subtilty was in the Roman law thereanent, yet that the same could never be respected in our cautioners; who differed exceedingly from theirs, and were in effect *correi debendi*, co-principals, bound conjunctly and severally for the debt, and so it was no matter whether they preceded or followed. But the debate ran on a gross ignorance of the civil law; for by it a cautioner may either precede or follow the principal obligation; *L. 4. and 6. D. de Fidejussoribus; par. 3. Instit. eodem; L. 50. D. de Peculio; L. 35. D. de Judiciis*. And as for the objection that it is a sequel, the same has no weight, because the lawyers make use of a fiction here, by which the accessorian obligation, though prior in time, yet *juris intellectu* is held posterior to the principal obligation; just like a substitution, which will be maintained by reason of this fiction though it precedes the institution of the heir; *l. 2. p. 5. et 6. D. de vulgari et pupillari*; and like to a servitude which may be imposed and constituted on a house not yet built; *L. 23. p. ult. D. de servit. urbanorum*. See *annotata* upon the act of Parliament in 1670, about annexing Orkney and Zetland to the crown.

*Advocates' MS. No. 228, folio 105.*